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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MARINE BANK, *Petitioner,*

v.

SAMUEL WEAVER and ALICE WEAVER, *Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## AMERICAN BANKERS ASSOCIATION BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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## ISSUES PRESENTED FOR REVIEW

1. Whether an FDIC-insured deposit, evidenced by a certificate of deposit, bearing a fixed rate of interest should be deemed an investment for profit subject to the Securities Exchange Act or a commercial transaction subject to banking laws?

2. Whether a bank's alleged acts or omissions are in connection with an alleged sale of a security by a bank debtor to a third party for purposes of the Securities Exchange Act where the undisputed facts in the record show that the bank was not even aware of this alleged sale of a security?

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## AMERICAN BANKERS ASSOCIATION BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

### INTEREST OF THE AMICUS

The American Bankers Association is the largest national trade association of the commercial banking industry. Its membership is composed of approximately 13,250 banks, or over 90% of the industry. Among the very core functions of the industry are the making of business loans, often secured by a pledge of collateral, and the acceptance and repayment of various kinds of deposits. The industry is probably the most highly regulated of any industry in the United States; it is subject to a complex body of laws and is supervised by federal and state regulatory agencies which govern in great detail the performance of those core functions.

The Third Circuit's opinion in this case, if permitted to stand, will unnecessarily superimpose an entirely separate and

perhaps inconsistent regulatory scheme upon the already pervasive bank regulatory scheme. The American Bankers Association, on behalf of its members, appears here, with the consent of the parties, to show that Congress never intended such a result.

## SUMMARY OF THE ARGUMENT

A commercial bank certificate of deposit is not a security, either under the plain words of the Securities Exchange Act of 1934 or when judged by the economic realities of that rather typical banking transaction. Moreover, a certificate of deposit is not sufficiently like the kinds of notes or bonds intended to be governed by the Securities Exchange Act, nor is it sufficiently like withdrawal capital shares of a savings and loan association for the securities laws to be applied to it. Indeed, application of the securities laws to a commercial bank certificate of deposit is unnecessary in view of the comprehensive regulatory scheme already in place for the protection of bank customers, and could well impose duplicative and inconsistent obligations on the banking industry.

The pledge of something that is not already a security does not make it a security. While a pledge may constitute a "sale" within the meaning of the Securities Exchange Act, that is only one of the statutory requirements. In order for the Act to apply, the thing sold must first be a security.

The involvement of the respondents in the business of a third party, unrelated to the petitioner bank, was a transaction separate and distinct, in law and in fact, from the certificate of deposit transaction. It was a transaction solely between the respondent and the third party, and entirely unknown to the petitioner bank. Regardless of whether that transaction constituted a sale of a security, nothing the petitioner bank did or failed to do was "in connection with" the sale of the security, because the record clearly demonstrates that the bank was unaware of the alleged sale.

## ARGUMENT

### I. BACKGROUND OF THE CASE.

In February, 1978, the respondents, Samuel and Alice Weaver, deposited $50,000 in the Marine Bank for a period of six years, at an interest rate of 7.5%,[1] and received a certificate attesting to this deposit. The object of the deposit was to have money available in a nearby bank for the operation of the Weavers' business. Joint Appendix at 62. The Marine Bank also had had prior dealings with a Mr. and Mrs. Raymond Piccirillo, doing business as the Columbus Packing Company. The Piccirillos were in need of additional financing for their business in order to pay off some outstanding indebtedness and to acquire working capital. Marine Bank agreed to extend a loan to the Piccirillos, provided that a guarantor could be found for the loan. Joint Appendix at 57.

Unbeknownst to the bank (Joint Appendix at 62, 64), in March, 1978, the Weavers and the Piccirillos entered into an agreement by whose terms the Weavers were to become "co-obligors" on the loan[2] and to receive in return a specified consideration. Joint Appendix at 11. The bank thereafter extended a loan to the Piccirillos in the amount of $65,000. The Weavers were not party to the loan transaction *per se*. Instead, they signed a separate document pledging their previously acquired certificate of deposit account as collateral for the Piccirillo loan.

When the loan was not repaid and Columbus Packing Company failed, the bank asserted its right to apply such part of the pledged certificate of deposit as might be needed to

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[1] The Third Circuit's opinion indicates that the interest rate was 6%, but that figure is erroneous. *See* Exhibit 1 to this brief.

[2] They never actually became co-obligors. That role was filled by the senior Piccirillos. The Weavers were guarantors instead. Thus, they became only secondarily liable on the loan, not jointly liable with the Piccirillos. Joint Appendix at 26, 34.

satisfy any deficiencies. The Weavers sued, ultimately alleging that both the certificate of deposit and the agreement with the Piccirillos were securities governed by the "anti-fraud provisions" of the Securities Act of 1933 and the Securities Exchange Act of 1934.[3] They further alleged that the bank had made material misrepresentations and had failed to reveal material facts in connection with the "sale" of the two "securities."

Summary judgment was granted to the bank in the U.S. District Court; the Third Circuit reversed, holding that both transactions could involve the sale of securities. This Court granted certiorari on June 1, 1981.

## II. A COMMERCIAL BANK CERTIFICATE OF DEPOSIT IS NOT A SECURITY.

The Third Circuit did not hold that certificates of deposit *were* securities; instead the court held that they *could* be. The court allowed that "[p]erhaps at trial some distinguishing features may be developed." *Weaver* v. *Marine Bank*, 637 F.2d 157, 164 (3d Cir. 1981). But such a procedure is unnecessary. Whether a commercial bank certificate of deposit is a security is a matter of law, and not of fact. As a matter of law, a commercial bank certificate of deposit is not a security as we show in this section. Accordingly, the district court was quite correct in granting summary judgment.

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[3] The Third Circuit's decision never dealt with any issues surrounding the independent applicability of the 1933 Act, treating the case as though it arose only under the 1934 Act. For convenience we shall do so as well. *This* case ought to be decided the same way whether only the 1934 Act is applicable or both Acts are, although different cases may arise in the future in which the differences between the Acts may be important.

### A. The Language Of The Statute.

Section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a) (1976)) provides that:

> When used in this chapter, unless the context otherwise requires. . .
>
> (10) the term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

"The *starting* point in every case involving the construction of a statute is the language itself."[4] A bank certificate of deposit is not specifically listed as a "security."

It is evident from the exhaustive list contained in section 3(a)(10) that Congress intended to include in the definition of "securities" every item that in the view of the legislators might be thought to be a security. Congress also added a catchall phrase to cover exotic or unusual transactions or anything that might be invented later that would have the same kind of characteristics or possibilities for abuse that the common and known securities had. H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933). Yet certificates of deposit were a known and common part of the banking business at the time the original securities laws were passed in the 1930's; the banks had specific federal statutory authority to offer them since at least 1913. *See* §19 Federal Reserve Act, 38 Stat. 270.

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[4] *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979) (hereinafter "*Daniel*") (emphasis supplied).

Congress' failure to include a known commodity in the list of "securities" is indicative of its intent that commercial bank certificates of deposit not be considered securities.

This conclusion is supported by reference to what Congress *did* include among the enumerated securities: a "certificate of deposit, for a security." The statutory use of this term has reference to a type of receipt for something that is already a security. It is an instrument commonly used in corporate reorganizations. *See* 1 Loss, *Securities Regulation* 460-62 (2d ed. 1961). A bank certificate of deposit, on the other hand, has nothing to do with corporate reorganizations. It is simply an evidence of an unpaid balance of *money* or its equivalent, 12 U.S.C. §1813 (1976), and money is not a security.[5] In short, a bank certificate of deposit is nothing more than a savings device for its depositors.

In adopting the federal securities laws, not only did Congress fail to mention commercial bank certificates of deposit, but knowing that various forms of "certificate of deposit" existed, it chose only to include one of those forms within the statutory definition of security. Under commonly applied rules of statutory construction, the intent to exclude the other forms must be presumed.

The Fourth Circuit has so held in deciding specifically that a certificate of deposit was *not* a security. That court pointed out that the statutory reference to " 'certificate of

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[5] In other contexts, the Supreme Court has recognized that deposits in financial institutions, even those not payable on demand, retain the "quality of moneys." *Porter* v. *Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962). Thus, the Third Circuit was too quick to hold that "[t]he certificate of deposit pledged by the Weavers was certainly not currency." 637 F.2d at 164. In reality, the certificate — a piece of paper — was not what was pledged. Rather, the underlying account was pledged. That may not have been currency, but it certainly was the "functional equivalent" of currency. The Third Circuit ignored *this* "functional equivalence" although it stood ready to hold the bank liable for dealing in something that is not a note or a bond, but is (in the court's opinion) the "functional equivalent" of a note or a bond.

deposit, for a security' has a negative pregnant: impliedly it excludes a certificate of deposit issued for currency or payable in currency." *Burrus, Cootes & Burrus* v. *MacKeithan,* 537 F.2d 1262, 1265, *vacated as moot,* 545 F.2d 1388 (4th Cir. 1976); *cert. denied,* 434 U.S. 826 (1977). *See also Canadian Imperial Bank of Commerce* v. *Fingland,* 615 F.2d 465, 468 (7th Cir. 1980).

In any event, the Third Circuit correctly held that the term "certificate of deposit, for a security," appearing in the statutory definition of "security" did not mean the same thing as a commercial bank certificate of deposit. *Weaver* v. *Marine Bank, supra,* 637 F.2d at 164 (fn. 9). The court was also correct in deciding, by inference at least, that most of the other forms of "security," such as stock, and oil and gas royalties, did not apply here.

The only two terms in section 3(a)(10) upon which the Third Circuit sought to rely in order to find that a commercial bank certificate of deposit might be a security were the words "note" and "bond." The court did not hold that a certificate of deposit *is* a note or a bond, but rather that it is or may be "functionally equivalent" to one or the other,[6] given the "economic realities" of the transaction. The court also found sufficient similarities between commercial bank certificates of deposit and the kind of withdrawable capital shares of a savings and loan association held to be a security by this Court in *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967) (hereinafter "*Tcherepnin*"). Both characterizations are erroneous as we show below.

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[6] In dealing with the economic realities of the transaction involved here, we do not distinguish between "notes" and "bonds." A bond is simply a special kind of note. *See* Munn, *Encyclopedia of Banking & Finance* 132 (1973). The technical distinctions between bonds and other notes are not relevant when the concentration is upon economic realities, as it must be.

**B. Certificates Of Deposit And "Economic Realities."**

In determining whether a particular transaction is one involving a "security" within the meaning of the Securities Exchange Act, it is not sufficient to show that the transaction does or does not fall within the enumerated categories of security set forth in the Act, although, as indicated above, that is the starting point. This Court has cautioned that "form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin*, *supra*, 389 U.S. at 336. The "economic realities" approach to deciding such issues has the effect of including certain transactions which would not seem to be covered by mere reference to the words of the Act,[7] and excluding others which would seem to be specifically covered by the words of the Act.[8]

The test for evaluating the "economic realities" of a transaction has been set forth by this Court. In *SEC* v. *Howey*, 328 U.S. 293, 301 (1946) (hereinafter "*Howey*"), the Court dealt with the analysis of the term "investment contract" — one of the categories of "security" included in the definition found in the 1934 Act. The Court held that the basic test for distinguishing investment contracts from other commercial dealings is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, *supra*, 328 U.S. at 301.

In *Forman*, the Court expanded on *Howey* so that the "investment contract" analysis is now to be applied in any determination of what is or is not a security:

> This test, in shorthand form, embodies the essential attributes that run through *all* of the Court's decisions

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[7] *E.g.*, *Tcherepnin*, holding that withdrawable capital shares of a savings and loan association are securities, although no reference is made to savings and loan shares in the statutory definition.

[8] *E.g.*, *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 848 (1975) (hereinafter "*Forman*"), holding that stock in a housing cooperative was not a security even though the statute specifically provides that "security" includes "any . . . stock."

> defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, . . . or a participation in earnings resulting from the use of investors' funds.*

*Supra*, 421 U.S. at 852 (emphasis supplied).

### 1. "Notes"

In lower court cases involving "notes," the majority have followed — and in some instances have anticipated — the Supreme Court's direction and have applied the investment contract analysis to determine which "notes" are governed by the Securities Exchange Act and which are not because the context requires otherwise. Generally, these cases find a distinction between "investment notes" intended to be covered by the securities laws and "commercial notes" which are not.[9]

The common thread running through all of these cases establishing or following the "commercial/investment" distinction is a search for the fundamental element of *profit* in the transaction, and it is profit as the Supreme Court has defined that term. "Profit" is not synonymous simply with "earnings" or a return on funds or anything of the sort. It is limited to a return based upon the entrepreneurial and managerial efforts of others. In cases where such a "profit" moti-

[9] *See Bellah* v. *First National Bank of Hereford, Texas*, 495 F.2d 1109 (5th Cir. 1974); *National Bank of Commerce of Dallas* v. *All American Assurance Co.*, 583 F.2d 1295 (5th Cir. 1978); *Emisco Industries, Inc.* v. *Pro's, Inc.*, 543 F.2d 38 (7th Cir. 1976); *C.N.S. Enterprises, Inc.* v. *G. & G. Enterprises, Inc.*, 508 F.2d 1354 (7th Cir. 1974), *cert. denied*, 423 U.S. 825 (1975); *Canadian Imperial Bank of Commerce* v. *Fingland, supra*, 615 F.2d; *Burrus, Cootes & Burrus* v. *MacKeithan, supra*, 537 F.2d; *Union Planters National Bank of Memphis* v. *Commercial Credit Business Loans, Inc.*, _____ F.2d _____ (6th Cir. 1981) [1981 Transfer Binder] *Federal Securities Law Reports* (CCH) ¶ 97,996; and *Lino* v. *City Investing Co.*, 487 F.2d 689 (3d Cir. 1973).

vation can be found, the transaction is held to be a security; where it cannot be found, the transaction is held not to be a security. Even where there may be a mix of "profit" and other forms of earnings, the dominant factor is determinative. In *Daniel*, for example, this Court found that *some* of the pension benefits ultimately to be received by a retiree would be derived from the "managerial efforts" of the Plan's trustees, but the Court still declined to hold that the pension plan was a security since most of the Plan's income was in the form of employer contributions and only a small portion came from investment of assets. *Daniel, supra*, 439 U.S. at 562.

Thus, when the Weavers in this case deposited $50,000 in the Marine Bank, they did not have any intention of making a *profit* on those funds.[10] Instead, the intention of the Weavers was to earn *interest* on their funds. Their rate of return was a fixed one — 7.5% — and receipt of that specified interest did not depend one whit upon the managerial or entrepreneurial efforts of the bank. If the bank made a profit in excess of 7.5%, the Weavers would not be entitled to share in that profit. They would still receive only 7.5%. By the same token, if the bank has a profit smaller than 7.5%, or if it suffered a loss in its operations, that would not reduce the Weavers' entitlement. They would still receive the agreed-upon 7.5%. Here, when the Weavers deposited their money in the bank, they entered into a purely commercial transaction; in essence, lending money to the Bank. Under the terms of the certificate itself (Exhibit I), they were entitled to a return of the money "lent" to the bank at maturity in February, 1984, together with an agreed-upon interest rate.[11] No element of an investment transaction appears, so the certificate of deposit cannot be a security.

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[10] In fact regulations of the Federal Reserve and the Federal Deposit Insurance Corporation specifically prohibit the use of the term "profit" in referring to interest earned on deposits. 12 C.F.R. §§217.6(f) (1980) and 329.8(e) (1981).

[11] What the Weavers did with the certificate of deposit later is not relevant to the determination of whether it was a security at the outset, as we shall discuss below. Here we deal solely with the deposit relationship between the Weavers and the bank.

A consideration related to an expectation of profit from the efforts of others is the *risk* of loss of most or all of the investment. Where such a risk does not exist, the transaction is normally not classified as a security. The consideration of an element of risk in the determination of what is and what is not a security is consistent with one of the overriding purposes of the securities laws.

The purpose of the Securities Acts is perhaps best set forth in President Roosevelt's March 29, 1933 message to Congress proposing that such laws be enacted:

> I recommend to the Congress legislation for Federal supervision of traffic in investment securities in interstate commerce . . .
>
> Of course, the Federal Government cannot and should not take any action which might be construed as approving or *guaranteeing* that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit.
>
> There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.

S. Rep. No. 47, 73d Cong., 1st Sess. 6-7 (1933) (emphasis supplied).[12]

When Congress followed the President's recommendation, it was not interested in enacting a law governing those transactions in which there was some guarantee; only for those transactions in which loss of all or most of the investment was possible. The object of the Securities Act was not to eliminate risk in securities transactions, but rather to make the risk an informed one. Even in the case of corporate bonds, which have a fixed rate of return regardless of the "profit" of

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[12] The President's message immediately preceded passage of the Securities Act of 1933, whereas this case arises principally under the provisions of the Securities Exchange Act of 1934. Nonetheless, to the extent that the antifraud provisions of the 1934 Act are designed to assure full disclosure of material facts to investors, its purpose is certainly the same as that of the 1933 Act.

the corporation, there is often a significant element of risk. The corporation may default on the bonds due to insolvency. Consequently, the securities laws expressly include such bonds. When Congress enacted the Securities Exchange Act it recognized only what was common understanding: "investment," in the mind of the investor, is a trade-off — a willingness to accept a risk of loss in return for the hope of a higher return than could be achieved by other, safer uses of the money, such as putting it in a bank.[13]

Precisely because of the absence of risk, the Ninth Circuit, in a case dealing with a credit line extended by a bank to a corporation evidenced by a note, declined to hold that the note was a security within the meaning of the Securities Acts:

> GWB [the bank] left very little to chance. Artko [the corporation] could do little without answering to bank. . . . While some "risk" was created by the lending of money, it amounted only to that risk normally associated with the lending of money for a period of time. There was no substantial dependent relationship between GWB's risk and Artko's enterprise efforts.

*Great Western Bank & Trust* v. *Kotz*, 532 F.2d 1252, 1259-60 (9th Cir. 1976) (footnotes omitted).

In *Forman*, *supra*, 421 U.S., while this Court declined to abandon the "profits" test and adopt a "risk capital" approach to the definition of securities, Justice Powell's majority opinion pointed out that application of such a test in that case would have achieved the same result:

> Purchasers of apartments in Co-op City take no risk in any significant sense. If dissatisfied with their apartments, they may recover their initial investment in full. . . . In view of the fact that the State has financed over 92% of the cost of construction and carefully regulates the development and operation of the project, bankruptcy in the normal sense is an unrealistic possibility. In any event, the risk of insolvency of an ongoing housing cooperative "differ[s] vastly" from the kind of risk of "fluc-

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[13] Congress *did* intend to guarantee the safety of bank deposits in separate, though contemporaneous, legislation creating the Federal Deposit Insurance Corporation. 48 Stat. 168 (June 16, 1933).

tuating" value associated with securities investments.

*Id.* at 857, n. 24. (citation omitted).

In the case of a certificate of deposit issued by a commercial bank, there is no risk to the depositor. The depositor may recover the initial deposit in full; there is not the kind of fluctuating value associated with securities; and the careful regulation of commercial bank operations by the state and federal government[14] makes any kind of failure to repay the deposit by the bank an unrealistic possibility.

**2. "Withdrawable capital shares"**

In addition to relying upon the words "note" and "bond" in the statute, the Third Circuit has relied also upon this Court's opinion in *Tcherepnin*, reasoning that since the withdrawable capital shares of a savings and loan association in that case were securities, and since the certificate of deposit here in issue was virtually indistinguishable from the savings and loan shares, at least in the mind of the "investor," then the certificate of deposit must be a security too. That reliance is misplaced, since every single characteristic of the transaction in *Tcherepnin* which this Court found to be of controlling importance is missing in this case. Indeed, a comparison of the two cases shows that the profit and risk analysis we suggest is the correct one.

In the *Tcherepnin* case, the "security" involved was a withdrawable capital share of an Illinois state-chartered savings and loan association. The character of these shares was determined by Illinois law. 389 U.S. at 336. Under that statute, the holders of the shares each became members of the savings and loan association and entitled to vote on association matters, much like stockholders in other business corporations are entitled to vote on corporate matters. 389 U.S. at 337. In the case of the Weavers here, holding the Marine Bank's certificate of deposit gave them no such right to vote

[14] *See* discussion below, pp. 16-21.

on corporate matters of the bank. They were not "members" of the bank; they were customers or depositors only.[13]

In *Tcherepnin*, the holders of the shares of the savings and loan association were not entitled to a fixed rate of return, but were entitled to receive instead whatever dividends might be declared from time to time by the board of directors. 389 U.S. at 337. Once again, the arrangement was much like the typical business corporation which pays its stockholders whatever dividends its directors establish, and which may vary periodically. This is not the case with respect to the Weavers' certificate of deposit. They contracted for a fixed rate of return, for a fixed period of time and the bank was contractually obligated to pay that rate of return, no more, no less, regardless of whether interest rates generally went up or down during the period the certificate was in force, and regardless of anything the bank's board of directors might have preferred after the fact.

In *Tcherepnin,* the return the investors received on their funds was tied, by law, to an apportionment of profits, and thus depended upon the skill and honesty of the managers of the savings and loan. The more profitable the operation of the business, the larger the dividend; if the profit was small or non-existent in any particular year, the dividends likewise diminished or disappeared. Not so in the case of the Weavers here. It mattered not whether Marine Bank suffered major losses in the conduct of its business or had the most profitable year any bank ever had; its obligations to the Weavers were fixed — 7.5% interest on $50,000 for six years.

In *Tcherepnin*, the savings and loan association was uninsured, so shareholders stood to lose any money they had in the association in the event of insolvency. In this case, the

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[13] The Third Circuit's opinion, 637 F.2d at 164, states that "bank securities are not exempt from the antifraud provisions of the 1934 Act." That is correct as far as it goes, but what is obviously meant by that is the capital stock of a bank — the kind of equity interest in a bank that was acquired by shareholders in the *Tcherepnin* case, but is *not* acquired by deposit holders like the Weavers.

deposits in Marine Bank were and are insured by the Federal Deposit Insurance Corporation, so even if the bank were to become insolvent, depositors (including holders of certificate accounts) would substantially recover their funds.

Even the legislative history is different as it applies to the shares in *Tcherepnin* and the certificate of deposit here. As this Court pointed out in *Tcherepnin*, there was testimony in 1933 before the House Committee on Interstate and Foreign Commerce by the United States Building and Loan League evidencing the understanding that the securities laws would apply to savings and loan shares. The League requested an exemption from the registration requirements of the law (which was granted), but specifically disclaimed any interest in an exemption from the anti-fraud provisions. *Tcherepnin*, 389 U.S. 340-42. The contrary conclusion must be drawn from the legislative history with respect to commercial bank deposits. The very same hearings show an understanding on the part of Congress that only the capital stock of commercial banks would be considered to be securities, and those securities would also be exempt from the registration requirements of the law:

> Mr. Mapes: This section exempts securities of national banks from coming under the provisions of the law. What securities do you have in mind there — anything except the stock of national banks?
>
> Mr. Thompson: It would be any kind of a security of a national bank. I do not suppose a national bank would be putting out anything in addition to its capital stock.
>
> Mr. Mapes: What would that be?
>
> Mr. Thompson: It is only stock, so I am told.

Hearings on H.R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 31 (1933) (testimony of Huston Thompson).

Mr. Thompson was one of the drafters of the bill which eventually became the Securities Act of 1933. *See id.* at 9. He could think of no "securities" of national banks other than capital stock, even though commercial banks had had the explicit statutory authority to offer certificates of deposit to

their customers since at least 1913 (Federal Reserve Act §19, 38 Stat. 270 (Dec. 23, 1913)).

### C. Certificates Of Deposit And The Bank Regulatory Scheme.

Aside from the "economic realities" discussed above, there is another kind of reality, recognized by this Court, which is important to the determination of whether the securities laws are applicable to a particular transaction. That is the existence of a comprehensive regulatory scheme directed at the specific transaction or instrumentality independent of the securities laws.

Banking is subject to some of the most complex and comprehensive statutory and regulatory schemes devised by both the federal and state governments. *Cook County National Bank* v. *United States*, 107 U.S. 445, 448 (1883); Davis, *Administrative Law* §4.04 at 247 (1st ed. 1958). There can be little doubt that much of this legislation has been designed to, and in fact does, protect not only the banking system itself, but also especially bank depositors. Some portion of the federal regulatory structure — for instance, the rules concerning advertising in connection with deposits (and certificates of deposit) — protect depositors in banks in much the same way that the Securities Acts protect investors in securities.

Yet despite this complete and detailed bank regulatory scheme, the Third Circuit concluded that there is no presumption that Congress intended to exclude banks from the protection of section 10(b) of the Securities Act of 1934. *Weaver, supra,* 637 F.2d at 163.

This conclusion ignores the *Daniels* case, *supra*, wherein this Court held that when comprehensive *federal* legislation governs an entire subject area, "all arguments for extending the Securities Acts" to that area are "severely undercut." 439 U.S. at 569. It also ignores decisions of this Court which hold that there is a presumption against extending the federal securities laws to areas which are governed by *state* law. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). A presumption

against application of the securities laws to the banking industry ought to be even stronger since there is already a complementary two-tier system, with *both* federal and state laws offering depositor protection.

### 1. State laws protecting bank deposits and depositors

Marine Bank is chartered by the Commonwealth of Pennsylvania and is subject to Pennsylvania banking laws.[16] Pennsylvania regulates many functions of banking, including the important deposit-taking function. Marine Bank's power to receive deposits is granted in section 302. The requirement that it give a "receipt" for every deposit (*e.g.*, a certificate of deposit) is specified in section 602(a). Section 105 requires Marine Bank to insure its deposits with the FDIC. Even aside from this important insurance, however, Pennsylvania, like all other states, has a host of laws geared to assuring the soundness of bank deposits.

One such law requires banks, such as Marine, which are not members of the Federal Reserve System, to maintain fixed reserves on time deposits (section 703), including funds represented by certificates of deposit. Although reserves serve a growing number of purposes, historically one of their principal benefits has been to assure a sufficiently liquid asset structure to meet the demand of depositors. Reserve requirements have been imposed on Pennsylvania banks since at least 1907, and the present law is very specific in setting forth the kinds of deposits which will qualify as reserves. Only coin, currency, U.S. obligations, and other marketable obligations specifically approved by the Department of Banking will do. (Section 704). Banks do not take reserve requirements lightly. They must give notice to the state regulator of any deficiency in their reserve fund within three days of the deficiency or they are subject to penalty. (Section 705).

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[16] Most of the laws are collected in Title 7, *Pa. Stat. Ann.* (Purdon 1967 and Supp. 1981) Unless otherwise indicated, the section references which follow are to that title.

Many other state laws are geared to preserving the soundness of banks which benefit depositors as well as shareholders and the public. For instance, in Pennsylvania, banks are limited in the size of loans they may make to a single borrower (section 306); in the rates of interest they may charge on different classes of loans (*see, e.g.*, sections 316-18, *Pa. Stat. Ann.* tit. 41, §201, *Pa. Stat. Ann.* tit. 69, §1904 (Purdon Supp. 1981); *see also* federal law 12 U.S.C.A. §86a (West. Supp. 1981)). They are regulated in branching, (sections 904 *et seq.*); in mergers and consolidations, (section 1601); in acquisitions, (section 112); and in forming a bank holding company, (sections 6001 *et seq.*).

Moreover, most states require frequent bank examinations, which allow for the continuing review of the polices and practices of commercial banks. While Pennsylvania authorities may, and do, accept FDIC examinations in lieu of their own, the law grants them the concurrent power to examine banks "at any time it deems such action necessary or desirable *for protection of depositors*, other creditors, or shareholders." (Section 2002) (emphasis supplied).

In addition to state statutes specifically pertaining to commercial banks, the respondents in this case assert that they have "a cause of action against Marine Bank under the [Pennsylvania] common law of fraud and misrepresentation." Complaint, ¶ 35, Joint Appendix at 9. If that is so — and we offer no opinion on the subject — then it is clear that it is unnecessary for the federal courts to assert jurisdiction under the federal securities laws.

**2. Federal laws protecting bank deposits and depositors**

The most significant protection for bank depositors is, of course, the federal deposit insurance fund which is administered by the FDIC.

Before a bank obtains federal deposit insurance, the FDIC must consider the adequacy of the bank's capital structure, the financial history of the bank, its future earnings prospects, the general character of its management, and the con-

venience and needs of the community to be served. 12 U.S.C. §1816 (1976). This assures that a bank begins on a sound basis.

Periodic examinations by the FDIC assure continuing protection for depositors and others. These examinations occur at least every 18 to 24 months and are conducted in accordance with uniform principles and standards for examinations prescribed most recently by the Financial Institutions Examination Council established by the Financial Institutions Regulatory & Interest Rate Control Act of 1978. 12 U.S.C. §3305(a) (Supp. III 1979).

At the time the Weavers' deposit was made, it was insured by the FDIC to $40,000,[17] and, therefore, theoretically some portion of the deposit was at risk. As this Court suggests in *Forman, supra,* 421 U.S. at 857, n. 24, however, lack of a 100 percent guarantee is not fatal in testing the applicability of the securities laws. And, as the Court said in *Daniel*, it is not proper to bring within the ambit of securities laws something that otherwise would not be there by focusing on the less important aspects of the transaction. 439 U.S. at 561. That the deposit was predominantly insured is enough.

Moreover, bank safety is not totally dependent on federal insurance. There are many controls placed on banks by Congress which assure the integrity of banks and the safety of their deposits even in addition to the deposit insurance *per se*. For example, no insured bank can reduce its capital stock without consent of the FDIC[18] (12 U.S.C. §1828(c) (1976)); all insured banks must report any changes in voting stock that will result in an acquisition or a change in control in a bank (12 U.S.C. §1817(j) (1976)); banks must obtain FDIC ap-

[17] The insurance ceiling was increased to $100,000 by a 1980 amendment to the FDIC Act. Act of March 31, 1980, Pub. L. No. 96-221, 94 Stat. 147, §308(b)(1).

[18] We deal here only with laws administered by the FDIC, since Marine Bank is a state bank subject to FDIC's jurisdiction. There are, however, comparable laws administered by the Comptroller of the Currency and the Federal Reserve Board applicable to banks under their respective jurisdictions.

proval to participate in mergers or to branch (12 U.S.C. §1828(c) and (d) (1976)); they are limited in forming a subsidiary corporation to do data processing (12 U.S.C. §§1861 and 1865 (1976)) and in forming a bank holding company (12 U.S.C. §1842 (1976)).

Banks are required to submit quarterly reports of condition to the FDIC (12 U.S.C. §1817(a)(4) and (5) (1976)). They must follow criteria established under the Bank Protection Act of 1968 to secure the bank's premises. (12 U.S.C. §§1729, 1881-84 (1976)). FDIC also requires banks to maintain blanket bonds (geared to the size of the bank) to cover losses occasioned through dishonest employees, fraud, burglary, forgery, misrepresentation, etc. (12 U.S.C. §1828(e) (1976) and FDIC Manual of Examination Policies §O).

The FDIC also has at its command a plethora of disciplinary powers which it may exercise to protect depositors. It can suspend or remove bank officers and directors for violations of the law or for previous dishonesty (12 U.S.C. §1818(e) (1976)), and it can order a bank to "cease and desist" in engaging in unsafe and unsound bank practices (12 U.S.C. §1818(b) (1976)). One action or inaction considered unsafe or unsound is "operating with management whose policies and practices are detrimental to the bank and *jeopardize the safety of the bank's depositors.*" (1979 FDIC Manual of Examination Policies §V) (emphasis supplied).

**3. Specific regulations governing certificates of deposit accounts adequately protect depositors.**

The application of the antifraud provisions of the securities laws to commercial bank certificates of deposit would most certainly be a case of regulatory overkill. The advertising regulations by which FDIC-insured banks, like Marine Bank, must abide already provide a form of disclosure to depositors which accomplishes as much or more in that regard as do the disclosure requirements of the securities laws for transactions in securities. Advertisements of interest on such deposits must conform to rules assuring adequate disclosure to prevent un-

fairness or deception. 12 C.F.R. §329.8 (1981). Advertisements, announcements or solicitations relating to interest paid on deposits may not be inaccurate or misleading or misrepresent the deposit contract. 12 C.F.R. §329.8(f) (1981). Persons who solicit certificates of deposit for banks are also bound not to mislead or misrepresent or to engage in unfair or deceptive disclosures. 12 C.F.R. §329.8(g) (1981). If banks offer certificates of deposit and advertise certain rates on the deposits which contain either time or amount limitations, these limitations must be clearly and conspicuously stated. 12 C.F.R. §329.8(d) (1981). These regulations carry their own sanctions as well. The FDIC is authorized to impose on any offending bank a civil penalty of up to $100 per day for violations. 12 U.S.C. §1828(h) (1976).

As a result of these many, varied, comprehensive statutes and regulations, it is clear that Congress intended to protect bank depositors by means of the banking laws without adding an additional layer of regulation and regulators under the securities laws. Therefore, simply "presuming" coverage by the securities laws, in the absence of some indication of Congressional intent, as the Third Circuit did in this case, creates the very great risk of needlessly duplicative and potentially conflicting obligations on the part of banks, and, as this Court said, "it serves no general purpose." *Daniel,* 439 U.S. at 570.

### D. A Certificate Of Deposit Is Not Transformed Into A Security When It Is Pledged.

In preceding sections of this brief, we have considered the relationship between a bank and its customer when the customer *places* funds on deposit in the bank and receives a certificate of deposit as a receipt for it. The discussion above shows that this transaction is not a securities transaction, nor would a securities transaction be involved in a case where the depositor simply *withdrew* the funds on deposit for any reason or no reason at all. To the contrary, such deposits and withdrawals are simply routine banking transactions, not governed by the Securities Exchange Act of 1934.

What is alleged to make this case different is the fact that the Weavers *pledged* their deposit as collateral for a loan to the Piccirillos and received an agreed upon consideration from the Piccirillos for this service. This Court has held that a pledge constitutes a "sale" within the meaning of the securities laws. *United States* v. *Rubin*, 66 L. Ed. 2d 633 (1981). Nonetheless, the "sale" is only one of the necessary elements of a securities law violation. In order to bring the securities laws into play, not only must there be a "sale," but the thing "sold" must also *be* a security to begin with. The Third Circuit agreed, carefully holding that the bank's alleged acts or practices were actionable "unless the pledge arrangement was not a sale *or* the certificate of deposit is not a security." 637 F.2d at 163 (emphasis supplied). In *Rubin* there was a pledge of *securities*, and thus there was a potential liability under the securities laws; here there was a pledge of a non-security, and the law does not apply to that.

### III. THE BANK DID NOT ACT OR FAIL TO ACT "IN CONNECTION WITH" THE WEAVER/PICCIRILLO AGREEMENT.

The pledge of the funds represented by the certificate of deposit and the Weaver/Piccirillo agreement are distinct and separable transactions, and all parties to this action are in agreement on this point. The Weavers argue:

> 1. That there was the purchase and sale of a security by Weaver to Marine Bank and specifically, a sale of a $50,000 certificate of deposit to Marine Bank on March 17, 1978.
>
> 2. That they purchased a *second* security on March 17, 1978 "in connection with" the transaction made reference to in the above paragraph of this answer.

Plaintiffs' Answer to Defendant's Motion for Summary Judgment, Joint Appendix at 39 (emphasis supplied).

The "second security" alleged was, of course, the Weaver/Piccirillo agreement, which was the entire subject of the original complaint. *See* Joint Appendix at 4-9.

The Third Circuit also dealt separately with the two transactions. It held that (1) the Weaver/Piccirillo transaction, independent of anything else, could be the purchase and sale of an investment contract, 637 F.2d at 161-62; and (2) that the pledge of

the certificate of deposit, independent of anything else, could constitute the purchase and sale of the functional equivalent of a note or a bond, 637 F.2d at 163-64.

Consequently, there is not here involved a singular transaction which, taking together its component parts, can be described as a "security" transaction. Each part must be considered on its own merits. We have shown above that the certificate of deposit account was not a security at the time the deposit was made, and that the subsequent pledge of the deposit did not make it so. In this section we will show that the separate transaction, the contract between the Weavers and the Piccirillos, does not give rise to liability on the part of the bank however that agreement is characterized.

Even if the Weaver/Piccirillo transaction is held to be the sale of a security (a subject this *amicus* does not choose to address), that is a matter between those parties only and, under the circumstances here, does not involve the bank.

Section 10(b) of the Securities Exchange Act prohibits fraud, misrepresentation and failure to reveal material facts, but only when done *in connection with* the sale of a security. The Third Circuit held that a fact finder could find on the record that the bank's activities were in connection with the Weaver/Piccirillo agreement. It then went on at length to discuss whether that agreement was a security, but did not stop to analyze the very important words "in connection with." On the record a fact finder could *not* have found that "connection" because the bank was wholly unaware of the existence of the agreement. The affidavits of the only two bank employees who had any involvement in the transaction establish that they did not know of the contract (Joint Appendix at 20, 22), and Mr. and Mrs. Weavers' depositions (Joint Appendix at 62-63, 64) confirm that the bank had no knowledge of the contract. The contract was signed in the Weavers' home, with only the Weavers and the Piccirillos present, and on the same day that the loan and pledge transaction took place.

As far as the bank knew, or could have known, the pledge of the certificate of deposit as collateral for the loan could have been entirely gratuitous (Joint Appendix at 49), or it could have been for some consideration paid to the Weavers *not* constituting a

security. For example, the Piccirillos could have made a cash payment to the Weavers at the time; the consideration could have involved only the use of the Piccirillos' barn and pastures, a promise by the Piccirillos to direct customers to the Weavers' auction business (Joint Appendix at 49), or any number of other forms of consideration which no one would contend to be securities under any definition.

The lack of knowledge on the part of the bank demonstrates that the plaintiffs have failed to satisfy the fundamental "in connection with" element of a securities violation.

To begin, the words "in connection with" and the reference to *material* facts in the statute and in Rule 10b-5 connote a *causal* relationship between the alleged violation and the alleged purchase or sale of a security, and this Court has so held. In *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 154 (1972), Justice Blackmun wrote for the Court that: "This obligation to disclose and this withholding of a material fact establish the *requisite element of causation in fact.*" (emphasis supplied).

In *Superintendant of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6, 12-13 (1971), Justice Douglas' opinion for the Court pointed out that the victim of the securities law violation had "suffered an injury *as a result of* deceptive practices touching its sale of securities as an investor." (emphasis supplied)

"Causation" is a doctrine imported into securities law cases from pre-existing common law torts. In fact, the "causation" element of the securities laws "is determined to be the statutory equivalent of the element of tort causation." *Imperial Supply Co., Inc.* v. *Northern Ohio Bank,* 430 F. Supp. 339, 361 (N.D. Ohio 1976).

Professor Loss says that "[s]tatutes build on the common law and, especially when statutes are new, judges and lawyers who are trained in common law are apt to look to it for guidance." 3 Loss, *Securities Regulation,* 1430 (2d ed. 1961). Dean Ruder agrees, pointing out that "tort theory has been a fertile source of doctrine under Rule 10b-5 and other securities laws" and particularly "tort law dealing with deceit." Ruder, "Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution," 120 U. Pa. L. Rev. 597, 620, 612 (1972).

Tort law principles of "causation," in turn, incorporate the element of foreseeability, even with respect to fraudulent misrepresentation:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance *in the type of transaction in which he intends or has reason to expect their conduct to be influenced.*

Restatement (Second) Of The Law, Torts §531 (1977) (emphasis supplied).

The lower courts have adopted the foreseeability element in construing the term "in connection with" in other securities law cases, generally following the well-regarded opinion of the Second Circuit in *Securities & Exchange Commission* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968), *cert. denied sub nom., Coates* v. *Securities & Exchange Commission*, 394 U.S. 976 (1969):

> Rule 10b-5 is violated whenever assertions are made . . . in a manner reasonably *calculated* to influence the *investing* public.[19] (emphasis supplied).

In *Texas Gulf Sulphur*, the corporation was issuing press releases that it knew would influence the decisions of thousands of purchasers and sellers of its own securities on a national securities exchange. By contrast, in this case the bank could hardly have calculated to influence an *investor* where it admittedly did not even know that the Weavers were to be *investors*. Even assuming an active role by the bank in this case, the worst that can be said is that the bank's efforts were "calculated" to influence the Weavers to participate in the making of a bank loan, and that is not a security.

In *Wessel* v. *Buhler*, 437 F.2d 279, 282 (9th Cir. 1971), allegedly misleading statements in a corporate financial report

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[19] The word "calculated" is like the words "manipulative or deceptive" and "device or contrivance." This Court has held that these latter words "strongly suggest that §10(b) was intended to proscribe *knowing* or *intentional* misconduct." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (emphasis supplied). The Court cited the *Texas Gulf Sulphur* case in support of that holding.

did not lead to liability for the accountant preparing the statements for the same reason. The statements were not made "in connection with" the purchase or sale of securities, even though securities ultimately were sold, because the accountant did not know that the statements would be used in preparing prospectuses which, in turn, would be used in the sale of securities.

In *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974), the court found that where accountants made certain allegedly false representations in a report of the bank's financial condition to its directors, such representations were not reasonably calculated to influence the investing public, and the accountants simply had no reason to foresee that their statements would be so used.

In *Sharp* v. *Coopers & Lybrand*, 457 F. Supp. 879, 887 (E.D. Pa. 1978),[20] the court specifically held that

> the "in connection with" requirement of Rule 10b-5 imposes in these cases the limitation that defendants can be liable for misrepresentations and omissions only if the defendants reasonably could foresee that these misstatements would be used in connection with the purchase or sale of a security.[21] (footnotes omitted).

Finally, Jennings and Marsh discuss the liability of accountants for fraud or misrepresentation in connection with the purchase or sale of securities as follows:

> If the certified financial statements or opinions are *intended to be used and are used, to the knowledge of the accountants,* in the sale of securities by the company or

[20] Affirmed in part, reversed in part on other grounds, _____ F.2d _____ (3d Cir. 1981), [1981 Transfer Binder] *Federal Securities Law Reports* (CCH) ¶ 97,971. The Third Circuit's opinion in this case did not specifically address the "in connection with" aspect of the district court's opinion quoted here. It did hold, however, that an accounting firm has a high standard of care in supervising its employees' preparation of documents which it knows will be used to influence investment decisions.

[21] The court distinguished between foreseeability of the *transaction*, discussed in this quotation, and foreseeability of *damages*, a separate issue. If the *transaction* is not foreseeable, as is the case here, then the actions or inaction of the defendant are not "in connection with" the purchase or sale of the security.

> someone else to the public, there would seem to be little question that the purchasers are persons entitled to complaint of that breach of duty.

R. Jennings & H. Marsh, *Securities Regulations: Cases and Materials* 1132 (4th ed. 1977) (emphasis supplied).

While this Court has not yet had occasion to determine whether knowing participation in a securities transaction is necessary to satisfy the "in connection with" requirement in section 10(b), it has determined that knowledge of the errors or omissions in statements of material facts, and an intent to make such errors or omissions, is essential to this class of claims. The reasons the Court adopted the scienter requirement in *Ernst & Ernst, supra,* 425 U.S., are equally compelling here.

As a normal part of their everyday business, commercial banks extend loans, both personal and commercial, and accept pledges from third parties as collateral. The collateral pledged may be virtually anything from the kind of certificates of deposit involved here to real estate to personalty. In the vast majority of such loan transactions, federal securities laws are in no way involved. But what the Third Circuit did in this case was impose what amounts to strict liability on a defendant who was admittedly unaware that the transaction (which was arguably one of the rare ones bringing the securities laws into play) was even occurring. Where Congress has intended to impose strict liability for securities transactions, it has done so quite clearly. For example, if an untrue statement of material fact is made in a registration statement, any person acquiring the registered securities can sue the issuer of such securities without regard to the knowledge or intent of the issuer. 15 U.S.C. §77k(a) (1976). Such clarity of congressional purpose is not evident with respect to section 10(b) as this Court held in *Ernst & Ernst, supra,* 425 U.S. at 200-01.

The logical and inevitable consequences of imposing strict liability on a bank, where it does not even know that a securities transaction is involved, point out the absurdity of so holding. If a bank is liable for unknown securities violations, it would seem that in *every* loan-and-pledge transaction in the future a bank would have some obligation — if only for its own protection — to inquire what, if anything, the pledgor is to receive as consideration for making the pledge. That infor-

mation would not ordinarily be sought since it does not in any way relate to the adequacy of the collateral for the loan. Then the bank must determine whether or not that consideration constitutes a "security." That may be a difficult task, as in this case, and again, that kind of determination does not normally arise in commercial banking activities. Next, if it *is* found or thought to be a security, the bank must disclose to the pledgor all material facts known about the borrower and thus risk liability for violation of the borrower's rights to confidentiality.[22]

Even if the bank makes inquiry into the form of consideration for the pledge, and the *bank* is affirmatively misled into believing that the consideration is a non-security, the bank would *still* be liable under the Third Circuit's decision if *in fact,* and despite the bank's knowledge or lack of knowledge, a security was involved and the bank's acts or omissions were somehow remotely tangential to that securities transaction.

Thus, since the bank was unaware of the Weaver/Piccirillo agreement entirely, and unaware particularly that any arrangement between those two parties might be construed as a securities transaction, it can hardly be said that the bank's alleged actions or inactions were "in connection with" a securities transaction. And, since that essential element is left unsatisfied, the bank cannot be liable under the federal securities laws for any losses the Weavers may have suffered from entering into the agreement with the Piccirillos.

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[22] *See, e.g., Peterson* v. *Idaho First National Bank,* 83 Id. 578, 367 P.2d 284, 290 (1961):

> Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. . . . It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract.

## CONCLUSION

For all of the reasons stated herein, the American Bankers Association respectfully asserts that the trial court correctly granted summary judgment in favor of the petitioner. There are no disputes over material facts in this case and, as a matter of law, a commercial bank certificate of deposit cannot be a security subject to section 10(b) of the Securities Exchange Act of 1934. Moreover, under the undisputed facts of this case, the petitioner's alleged acts and omissions were not in connection with the purchase or sale of an alleged security by and between the respondent and a third party unrelated to the petitioner, and so the petitioner cannot be held liable under the Securities Exchange Act for any damages arising from that transaction. The Third Circuit erred in holding otherwise, and its decision should be reversed.

Respectfully submitted,

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August 6, 1981

The American Bankers Association gratefully acknowledges the advice and counsel of Robert C. Pozen, Esq., Caplin and Drysdale, Washington, D. C., in the preparation of this brief.

EXHIBIT I

**MARINE BANK**
Serving Northwestern Pennsylvania

# CERTIFICATE OF DEPOSIT

Single Maturity ☐
Multiple Maturity ☐
15

No. 38240

Date Feb. 28, 1978

Tax Ident. No. 176-28-8688

This is to certify that there has been deposited in the bank and is payable

10-MARINE BANK-50000dol's00cts

Payable to: Ezra M. or Alice F. Weaver
19-52

Address: RD #4 Union City, PA 16438
19 52

Payable 72 months from date hereof, upon presentation of this certificate, properly endorsed, with interest at the rate of
27-29

7.50 % per annum, computed Quarterly, payable maturity, interest to be ☒ paid by check or ☐ deposited in my
26 19

account no.
83 84-73

This certificate is a contract to keep the funds on deposit until the stated maturity. Should the Bank permit withdrawal of all or part of the deposit before maturity, you will still earn the then current regular savings passbook rate on the withdrawn funds for all but the last three (3) months prior to withdrawal. No interest will be paid on withdrawn funds for the last three (3) months they were on deposit.

Multiple Maturity certificates shall be considered to be redeposited on the same terms and conditions at maturity unless withdrawn by the depositor on a maturity date or within ten (10) days thereafter. The Bank reserves the right to redeem Multiple Maturity certificates by giving written notice to the depositor not less than thirty (30) days prior to any maturity date. Single Maturity certificates are payable upon demand at maturity and cease to accrue interest after that date.

THIS CERTIFICATE IS NOT NEGOTIABLE

By _____
Authorized Signature

2708-R 7/75

1a

No. 80-1562

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MARINE BANK,

Petitioner,

v.

WEAVER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CONSENT TO THE FILING OF A BRIEF AS AMICUS CURIAE

In accordance with Rule 36 of the Rules of the Supreme Court of the United States, the undersigned hereby consents to the filing of a brief by the American Bankers Association as amicus curiae in the above-entitled case in support of the Petitioner.

Christine Hall McClure

Christine Hall McClure

Counsel for:

Marine Bank, Petitioner

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Andrew J. Conner, Esquire

Counsel for:

Respondent, WEAVER